(34)

No. 99-1426

Supreme Court, U.S.
FILED
OCT – 6 2000
CLERK

IN THE

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., CHAMBER OF COMMERCE OF THE UNITED STATES, *ET AL.*,*

Cross-Petitioners,

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*,

Cross-Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR CROSS-PETITIONERS

ROBIN S. CONRAD
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Counsel for Cross-Petitioner Chamber of Commerce of the United States

EDWARD W. WARREN
Counsel of Record
ROBERT R. GASAWAY
JEFFREY B. CLARK
DARYL JOSEFFER
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

CHARLES FRIED
1525 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4636
Counsel for Cross-Petitioners American Trucking Associations, Inc. and Chamber of Commerce of the United States

*Additional Parties and Counsel Listed on Inside Cover

October 6, 2000

30PP

BETH L. LAW
ROBERT S. DIGGES
ATA LITIGATION CENTER
2200 Mill Road
Alexandria, VA 22314
Counsel for American Trucking Associations, Inc., Burns Motor Freight, Inc., Garner Trucking, Inc., and Genie Trucking Line, Inc.

GARY H. BAISE
ELIZABETH S. POLINER
BAISE, MILLER & FREER, P.C.
1020 19th Street, N.W.
Suite 400
Washington, D.C. 20036
Counsel for Equipment Manufacturers Institute

DAVID M. FRIEDLAND
BEVERIDGE & DIAMOND
1350 I Street, N.W.
Suite 700
Washington, D.C. 20005
Counsel for National Small Business United, The American Portland Cement Alliance, and The Glouster Company, Inc.

ERIKA Z. JONES
TIMOTHY S. BISHOP
ADAM C. SLOANE
MAYER, BROWN & PLATT
1909 K Street, N.W.
Washington, D.C. 20006
Counsel for American Farm Bureau Federation

ROBERT R. GASAWAY
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
Counsel for American Road and Transportation Builders Association

JAN S. AMUNDSON
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Counsel for National Association of Manufacturers

DIMETRIA G. (JIM) DASKAL
THE DASKAL LAW GROUP
3 Church Circle
Suite 500
Annapolis, MD 21401
Counsel for National Coalition of Petroleum Retailers

DOUGLAS I. GREENHAUS
NATIONAL AUTOMOBILE DEALERS ASSOCIATION
8400 Westpark Drive
McLean, VA 22102
Counsel for National Automobile Dealers Association

JEFFREY L. LEITER
CHET M. THOMPSON
COLLIER, SHANNON, RILL & SCOTT
3050 K Street, N.W., Suite 400
Washington, D.C. 20007
Counsel for Non-Ferrous Founders' Society

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INTRODUCTION

As demonstrated in our briefs as cross-petitioners and respondents, the Clean Air Act ("CAA" or "the Act"), properly construed, requires that the Administrator consider competing factors including costs in setting National Ambient Air Quality Standards ("NAAQS"). *See* Cross-Pet. Br. 32-43; ATA Resp. in No. 99-1257, at 3-4, 21-22. Judging "public health" by "a systematic weighing" of competing factors comparable to that required by Executive Order 12,866 provides the Administrator with the "intelligible principle" necessary to satisfy constitutional requirements and channel her NAAQS rulemaking so as to permit judicial review on customary rationality grounds. *Id.* at 11-25; Cross-Pet. Br. 30-32, 47-50.

The Administrator and her supporters seek to sidestep these points by mischaracterizing NAAQS as mere "air quality targets," EPA Resp. 3, "more akin to statutory policy objectives" than actual standards, Mass. Resp. 2, and then by pretending that ATA has argued that NAAQS should be set by an "economic and technological *feasibility*" test. EPA Resp. 3 (emphasis added); *see also id.* at 14, 16, 17, 18, 19 (repeatedly mentioning "feasibility" or "technological feasibility" as ATA's basis for setting NAAQS). But far from being simply "targets" or "policy objectives," NAAQS trigger the imposition of numerous mandatory requirements (CAA §§ 171-75, 42 U.S.C. §§ 7501-05) that are legally enforceable through federal sanctions on States ("highway sanctions," CAA § 179(b)(1), 42 U.S.C. § 7509(b)(1)) and the private sector (emissions "offsets" for new or modified sources, CAA § 179(b)(2), 42 U.S.C. § 7509 (b)(2)). Nor has ATA ever argued that NAAQS should be set based on "feasibility"—an entirely different concept from "cost-benefit analysis" or "public health" under this Court's decisions and the Clean Air Act.

This Court's decision in *American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490, 509 (1981) ("*Cotton Dust*"), thus carefully distinguishes between "feasibility analysis" and "cost-benefit analysis," and then holds that a cost-benefit analysis is foreclosed for toxic substance workplace

standards (as opposed to safety standards) because section 6(b)(5) of the Occupational Health and Safety Act instead provides a feasibility test for setting those standards. Likewise, the Court's decision in *Union Electric Co. v. EPA*, 427 U.S. 246, 249 (1976), specifically addresses only whether the petitioner could "raise the claim that it is economically or technologically infeasible to comply" with emissions limitations included in a State Implementation Plan ("SIP") required under a NAAQS set by EPA. That decision does not address the separate question of how the Administrator should make public health determinations, but it does foreclose altogether the Administrator's argument here that NAAQS are simply "targets" until "feasibility" is resolved by EPA at a later stage. *See id.* at 265.

As we show, the concept of "public health" underlying the setting of NAAQS rejects a feasibility test in favor of a weighing of competing considerations, a point amply confirmed not only by the meaning of the term "public health" but also by the statutory structure and legislative history. *See* Cross-Pet. Br. 33-42; pp. 8-19, *infra*. Nor is there any reason to believe that setting NAAQS on such a public health basis would systematically lead either to less stringent (or more stringent) ambient standards, much less produce the "chaos" predicted by the Administrator's supporters. *See, e.g.*, Cal. *Amici* Br. 2. In fact, because cost-benefit analysis is a neutral tool, agency officials may try to use it in some circumstances to attempt to justify more stringent standards than either a feasibility test, *see, e.g., International Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. OSHA*, 938 F.2d 1310, 1326 (D.C. Cir. 1991); *cf.* Cross-Pet. Br. 42 n.2, or the standardless approach that the Administrator followed in setting these NAAQS, *see* Cross-Pet. Br. 44-45 (discussing the role of cost-benefit analysis in setting of PM_{10} NAAQS in 1987).

In this Reply, we show that science alone does not suffice to make the public policy choices necessary in setting NAAQS, and that this Court's decisions preclude any suggestion that

Congress implicitly delegated to the Administrator authority to make choices of such "economic and political significance" without considering competing factors including costs. *See* Part I, *infra*. Instead, Congress directed the Administrator to set NAAQS based on the public health as a means of authorizing the Administrator to perform equitable balancing of the sort previously carried out by courts and the States—a conclusion confirmed by the traditional meaning of public health as well as by the statutory text and structure, and even the legislative history cited by the Administrator herself. *See* Part II, *infra*. Finally, any application of *stare decisis* here would defeat the aim of transparent decisionmaking, ignore the fact that *Lead Industries* lacks precedential authority even in the D.C. Circuit, and undercut the fundamental rule that denials of *certiorari* carry no precedential weight in this Court. *See* Part III, *infra*.

ARGUMENT

Cloaked in the mantle of *Lead Industries*, the Administrator claims that science alone allows her to judge which particular numeric NAAQS level is "requisite to protect the public health" "with an adequate margin of safety." That claim, belied by logic and contradicted by her own admissions, *see* Cross-Pet. Br. 8, 16, 29-30; ATA Resp. in No. 99-1257, at 11, 17-21, produced the constitutional nondelegation infirmity identified by the D.C. Circuit. *See* Gen. Elec. *Amicus* Br. in No. 99-1257, at 1-4; Mercatus Center *Amicus* Brs.; *see generally* David Schoenbrod, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993); Marci A. Hamilton, *Representation and Nondelegation: Back to Basics*, 20 Cardozo L. Rev. 807 (1999). But for reasons already presented, *see* Cross-Pet. Br. 32-43, and further developed below, this Court may properly resolve this case by repudiating *Lead Industries* on ordinary statutory interpretation grounds, thus defusing the constitutional questions it would otherwise be forced to confront. *See* ATA Resp. in No. 99-1257, at 11-14, 21-25.

I. THE ADMINISTRATOR HAS NO ANSWER FOR OUR ARGUMENTS THAT THIS COURT'S DECISIONS UNDERMINE THE *LEAD INDUSTRIES* DOCTRINE.

Lead Industries assumes an extraordinarily extravagant delegation of legislative power to the Administrator. In the context of regulations that dramatically affect the whole economy, *Lead Industries* presupposes that Congress delegated to the Administrator the authority to set NAAQS without any consideration of competing considerations. *See* ATA Resp. in No. 99-1257, at 9-10. But as this Court's decisions show, "Congress could not have intended to delegate" to the Administrator "a decision of such economic and political significance . . . in so cryptic a fashion." *See FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1315 (2000); *MCI v. AT&T*, 512 U.S. 218, 231 (1994); *Christensen v. Harris County*, 120 S. Ct. 1655, 1664 n.1 (2000) (Scalia J., concurring); *id.* at 1667 (Breyer, J., dissenting). The Administrator offers no response to these decisions; indeed, the only one of her supporters to mention them merely makes the correct but irrelevant point that these decisions do not "deal with the Clean Air Act, the consideration of costs under environmental statutes, or the use of cost-benefit analysis." Environmental Defense *Amici* Br. 16-19.

Rather than grapple with the inherent limits of congressional delegation under this Court's decisions, the Administrator contents herself with arguing that she can set NAAQS based on science alone, consistent with both the Act and the nondelegation doctrine. EPA Resp. 32-34. But that proposition is simply not defensible. The Administrator, accepting *Lead Industries*, had but two logical alternatives available—set the ozone and PM NAAQS "at zero" *or* select a non-zero standard without considering competing factors in favor of or against any particular NAAQS. *See* Pet. App. 15a; Cross-Pet. Br. 28-32. The Administrator denies that these are the only logical alternatives, *see* EPA Resp. 32-34, but she

never confronts the core insight underlying the lower court's analysis—specifically, that "[s]cience *describes*, it does not *prescribe*." *See* Marchant *Amici* Br. in No. 99-1257, at 5 (emphasis added). As the National Academy of Sciences has said, "science alone can never be an adequate basis for a risk decision" because such decisions "are, ultimately, public policy choices" which turn on "political, economic, and technical considerations." *Id.* at 6-7 (quoting NAS Red Book at 19 & 7) (emphasis added). Indeed, *Lead Industries* itself recognizes that the selection of a NAAQS "presents complex questions of science, law, *and* social policy under the Act." *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1146 (D.C. Cir. 1980) (emphasis added). Of course, it is precisely because science alone is inadequate for deciding public policy questions that the Administrator can identify no intelligible principle that cabined her decisionmaking here, *see* ATA Resp. in No. 99-1257, at 11-12, and that her attempts to justify her decisions on science alone are so contradictory and unpersuasive. *See id.* at 17-21; *accord* Hatch *Amici* Br. in No. 99-1257, at 13-17, 26-30.

The Administrator's claimed basis for saying that science alone *is* somehow decisive on this record begins by conceding that she has "never encountered" facts that would warrant setting a zero level standard, EPA Resp. 32, or even a zero-risk standard (taking into account "risk-risk" tradeoffs). *See* Marchant *Amici* Br. in No. 99-1257, at 16 (noting this type of zero-risk approach). The Administrator and her supporters go on to argue that a non-zero standard is not arbitrary even for non-threshold pollutants. *See* EPA Resp. 33-34; Mass. Resp. 42-43. This contention, couched in multiple double negatives, *see, e.g.*, Mass. Resp. 43, is refuted by the Administrator's own repeated concessions about her decisionmaking process, *see* ATA Resp. in No. 99-1257, at 11, 17-21, as well as by the simple fact that, "unless the Administrator affirmatively determines a health effects threshold and sets the standard with that threshold as the starting point, there will always be 'possible, but not certain' health effects at every level." *Id.* at

19 (quoting 62 Fed. Reg. 38,652, 38,678 (July 18, 1997)); *see also* Gen. Elec. *Amicus* Br. in 99-1257, at 24-26. The Administrator's apparent answer is that she can regulate only "medically significant risks," EPA Resp. 33—a formulation indistinguishable from other formulations that she has always categorically rejected. *See, e.g.*, 62 Fed. Reg. 38,856, 38,883 (July 18, 1997) (no requirement that she determine "what risk is 'acceptable'"); Resp. Br. in D.C. Cir. No. 97-1441, at 42 & n.40 (Administrator not required to "make a 'finding' that the existing standard permits a 'significant risk of harm' to public health."); *see also* MAPI Br. in No. 99-1257, at 4 n.4.

Certainly, the Administrator would *now* like to claim that science alone does provide the answers. But she repeatedly said just the opposite in the agency proceedings— specifically, that her decisions were "largely judgmental in nature" and followed "no generalized paradigm." 62 Fed. Reg. at 38,883. Likewise, the EPA Staff Paper expressly called the Administrator's decision a "policy judgment," OJA 1971-72, 1976, and CASAC concurred, saying that a collective scientific judgment was not possible, meaning that any recommendations from individual members were only "personal" policy preferences, *see id.* at 237. *See generally* Cross-Pet. Br. 6-8, 13-15.

Because a zero-risk standard is clearly unavailable under the Act, *see Pegram v. Herdrich*, 120 S. Ct. 2143, 2150 (2000), and science alone is unable to select from among the limitless possible NAAQS levels, "a systematic weighing" of competing considerations emerges as the logical choice for NAAQS standard-setting. *See* Cross-Pet. Br. 30; ATA Resp. in No. 99-1257, at 21-25. "Cost-benefit analysis," so defined, "is broad enough to include *properly performed* analyses under 'significant risk' and similar rubrics." *Id.* (emphasis added). Costs thus inevitably become part of those analyses. For example, when the ozone standard was first revised in 1979, then-Chairman of the EPA Science Advisory Board, James Whittenberger, repeatedly voiced the logical difficulties presented in deciding what might be "significant" health risks

"without considering the social and economic consequences of those decisions." Mark K. Landy, *et al.*, THE ENVIRONMENTAL PROTECTION AGENCY: ASKING THE WRONG QUESTIONS FROM NIXON TO CLINTON 53 (1994); *see also* Cross-Pet. Br. 45-47 (citing cases). Moreover, consideration of cost is also inherently part of the "Quality-Adjusted Life Years" approach suggested by the court below. *See* Robert Fabian, *The Qualy Approach, in* VALUING HEALTH FOR POLICY: AN ECONOMIC APPROACH 118, 120 (1994) ("The qualy method provides a utility-based cost-effectiveness analysis, often called cost-utility analysis.").

Even if the Act did not contemplate a form of equitable balancing in setting public health NAAQS, *see* pp. 8-19, *infra*, the Administrator would still lack implicit authority under this Court's decisions to ignore competing factors including costs. *See* Cross-Pet. Br. 25, 31-32, 47. The formal mechanisms for such balancing when setting NAAQS are already in place under Executive Order 12,866 and the utility of conducting such analyses has impressive support from a broad spectrum of leading economists and other public policy experts. *See* AEI-Brookings *Amici* Br. Indeed, if such analyses were only *permitted* under the Clean Air Act, then they would be *required* by the Unfunded Mandates Reform Act ("UMRA") and case law recognizing that an agency's refusal to consider factors deemed significant by Congress is inherently arbitrary and capricious. *See id.* at 11; Cross-Pet. Br. 50 (citing cases).

Finally, the Administrator and her supporters argue that expanding the factors she considers beyond strictly scientific matters would not solve the constitutional nondelegation problem presented by NAAQS standard-setting. *See* EPA Resp. 47-49. To be sure, if the Administrator deliberately disregarded the results of cost-benefit analyses conducted within her authority under the Act, that action would pose, not just nondelegation questions, but also grounds for reversal on customary APA rationality review grounds. *See* ATA Resp. in No. 99-1257, at 23. But as we have shown, interpreting the

Act to require that the Administrator consider competing factors including costs in setting the NAAQS would resolve the nondelegation question for the same reasons that weighing competing considerations resolves constitutional doubts when other agencies set numeric values or decide questions of degree in ratemaking and similar proceedings. *See id.* at 11-14.

II. CONGRESS DID NOT REPEAL THE PREEXISTING CLEAN AIR ACT PRACTICE OF CONSIDERING COMPETING FACTORS WHEN IN 1970 IT DIRECTED THE ADMINISTRATOR TO SET "PUBLIC HEALTH" NAAQS.

The Administrator's response to the statutory text discussed in our opening brief, *see* Cross-Pet. Br. 32-43, does not contest that the term "public health" in section 109(b) of the Act, 42 U.S.C. § 7409(b), must be construed "in accordance with its ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). She instead argues that the definition of public health that we cite does not constitute "its ordinary or natural dictionary meaning in light of the context in which it is used." EPA Resp. 36 (citation omitted). As demonstrated below, the Administrator is wrong both about the "dictionary meaning" of public health and about its meaning within the context of the Clean Air Act.

Our opening brief cites the seminal public health definition in C.E.A. Winslow's THE COST OF SICKNESS AND THE PRICE OF PUBLIC HEALTH, a 1951 World Health Organization study of the comparative costs and effectiveness of various measures for controlling tuberculosis. Cross-Pet. Br. 34. Winslow is credited by name in leading scientific dictionaries as providing the most authoritative definition of public health. *See id.* His formulation is thus the origin of the vast majority of public health definitions found both in scientific and general-usage contexts. *See, e.g.*, MERRIAM-WEBSTER'S MEDICAL DESK DICTIONARY 669 (1996); Naomi N. Modeste, DICTIONARY OF PUBLIC HEALTH PROMOTION AND EDUCATION: TERMS AND

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The Administrator counters these authorities in her footnote 28, *see* EPA Resp. 36, by attempting to combine the *separate* definitions of "public" and "health" found in WEBSTER'S THIRD. But surely the Administrator could not have overlooked the fact that WEBSTER'S THIRD defines the full term "public health," thus making unnecessary this contorted effort at combining separate definitions. Tellingly, the "public health" definition in WEBSTER'S THIRD—"the art and science dealing with the protection and improvement of community health by organized community effort and including preventative medicine and sanitary and social sciences"—not only closely parallels Winslow's, but also expressly recognizes the role played by the "social sciences" such as economics. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1836 (1976).

The BLACK'S LAW definition cited by the Administrator in the same footnote at least refers to the combined term "public health." But that definition, which mentions "health of the community at large," then goes on to reference "the methods of maintaining the health of the community, as by *preventative medicine* and *organized care* for the sick." BLACK'S LAW DICTIONARY 724 (7th ed. 1999) (emphasis added). That formulation, like so many others, brings to mind Winslow's discussion of preventative medical responses to tuberculosis, as well as the cost-of-care issues that, as this Court recently acknowledged, are inherent in any regime for "organized care for the sick." *Pegram*, 120 S. Ct. at 2150 (degree of "risk" that is "unacceptabl[e]" in HMO context necessarily "depend[s] on

a judgment about the appropriate level of expenditure for health care in light of the associated . . . risk"). *See also* Hatch *Amici* Br. in No. 99-1257, at 25 n.17.

Understandably, the Administrator does not challenge the fact that modern public health judgments about a wide array of matters are made on cost-benefit bases. *See* Cross-Pet. Br. 35 n.1 (citing examples). Rather, she implies that this reliance on cost-benefit analysis in public health matters may be a new phenomenon. But that is simply not the case. For example, on the eve of Congress' passage of the 1970 Clean Air Act Amendments, U.S. Public Health Service Administrator Charles C. Johnson, Jr., explained that the public health profession's concern should be "the *total* well-being of the citizen," and, accordingly, "since we are interested in the 'whole man,' let's see what [air pollution] costs us in economic terms." Charles C. Johnson, Jr., *Environmental Health Protection*, 24 Food Drug Cosmetic L.J. 348, 349, 355 (1969) (emphasis in original). Administrator Johnson's statement reflects a long tradition that continues to the present. *See, e.g.*, Barbara B. Perkins, *Public Health Then and Now: Economic Organization of Medicine and the Committee on the Costs of Medical Care*, 88 Am. J. Public Health 1721, 1724 (1998) (tracing concern with "the most economic use of capital" in public health from 1927 to modern-day HMOs); *accord Pegram*, 120 S. Ct. at 2150.

This public health tradition has been reflected in federal air pollution control law from its inception. Congress first used "public health" in the Air Pollution Control Act of 1955, which,"in recognition of the dangers to the *public health* and welfare," directed that the "*Public Health Service*" assist the Department of Health, Education, and Welfare ("HEW") in administering the Act. *See* Pub. L. 84-159, ch. 360, 69 Stat. 322, § 1 (1955) (emphasis added). Congress' goal, as reaffirmed in the Clean Air Act of 1963, was "air pollution abatement." *Id.*; *see also* Pub. L. 88-206, 77 Stat. 392, § 5(a) (1963). In 1963, Congress also expanded the 1955 Act's reach,

by authorizing federal courts to "abate" pollution that threatened "the *health* or welfare of *any persons*," with the courts deciding in each case, *inter alia*, what "the *public interest* and the *equities* of the case may require." *Id.* § 5(a, g) (emphasis added). This statutory distinction between the "health of any persons," and "the public interest and the equities" flowed from the Act's purposes: "to protect the Nation's air resources," but only "*so as*" necessary "to promote the *public health* and welfare and the productive capacity of its population." *Id.* § 1(b)(1) (emphasis added). In short, "public health" was the Act's overall goal, and Congress recognized that its achievement required that "the health . . . of any persons" be balanced along with the "public interest and equitable factors."

The required "abatement" of air pollution under this balancing approach naturally drew on public health nuisance law, which has always entailed an equitable balancing of countervailing factors. *See, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030-31 (1992) ("state nuisance law ordinarily entails" consideration of countervailing factors, including "the social value of the [landowner's] activities"). In abating public health nuisances in the environmental context, courts thus seek to "strik[e] a balance" between adverse "health effects" and countervailing "social and economic consequences." *Reserve Mining Co. v. EPA*, 514 F.2d 492, 535-36 (8th Cir. 1975) (*en banc*) (reversing injunction abating a public health nuisance); *see also Illinois v. City of Milwaukee*, 406 U.S. 91, 107, 108 (1972) ("the informed judgment of the chancellor will largely govern" since courts are "empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution").

Within this public health tradition, Congress amended the Act in 1967 to direct States to set "ambient air quality standards." These standards would apply in public nuisance abatement actions brought (as before) whenever air pollution "endangers the health or welfare of any persons." *See* Air

Quality Act of 1967, Pub. L. 90-148, 81 Stat. 485, § 108(a). HEW was to assist the States by developing scientific "criteria" documents and documents relating to "control techniques," and then recommending a "level of air quality." *Id.* § 107(b). The States were to set numeric standards "consistent with the air quality criteria" and the "recommended control techniques." *Id.* § 108(c)(1). As the Senate Report explained, these State standards were to be *prescriptive* because they would be: "[a]n expression of *public policy rather than scientific findings*" and accordingly their development would reflect "*economic, social, and technological considerations.*" S. Rep. No. 403 at 28 (1967) ("1967 Senate Report") (emphasis added). In addition, the 1967 Amendments also kept the 1963 Act's key distinction between "the equities of the case" and "the *technological and economic feasibility*" as applied in abatement actions. § 108(c)(4) (emphasis added).

The Administrator argues essentially that Congress made a black-to-white change from this previous regime when the Act was amended in 1970. In her view, Congress repealed all previous provisions for public health balancing or consideration of competing factors—the framework under which courts and States had administrated federal air pollution control law since 1955. EPA Resp. 21-25. She thus omits any mention of the preexisting judicial balancing in abatement actions and characterizes the State balancing of competing interests under the 1967 air quality standards as simply a failed "experiment" that Congress repealed wholesale. *Id.* at 24. Support for her theory consists primarily in the fact that Congress' new standard-setting provision (section 109(b)) omits express reference to the "recommended control techniques" and specifically states that NAAQS should be "based on such criteria," meaning the air quality criteria called for in section 108(a)(2), 42 U.S.C. § 7408(a)(2). *See* EPA Resp. 22-25. The consequence of this change, according to the Administrator, is that NAAQS are to be determined exclusively by science—in her words, "based on air quality"—"*alone.*" *Id.* at 24 (emphasis

added). As for "feasibility and the effects of implementing the standards," the Administrator says these were left "for later stages in the regulatory process." *Id.*

The Administrator simply fails to prove this black-to-white theory of the 1970 Amendments. Initially, the Administrator's theory is undercut by the new section 109(b) which added the term "judgment," suggesting that the Administrator should apply ordinary rationality in setting NAAQS—specifically, that she avoid taking actions that do "more harm than good." *See* Antonin Scalia, *Regulation—The First Year*, REGULATION, Jan./Feb. 1982 at 19-20. Equally significant, the Administrator's "science only" interpretation of section 109(b) would, in her words, require that she provide all the protection suggested by science to "the general population, or identifiable groups within communities," as distinguished from "any specific individual." EPA Resp. 36 & n.28. But that concept (protecting the "health of any persons") was precisely what Congress rejected when it substituted public health NAAQS for the pre-1970 abatement trigger—pollution that "endangers the health or welfare of any *persons*" in the plural. *See* Cross-Pet. Br. 33-34. This reference to protection of "persons" in the plural, as distinct from "any specific individual," was so central under the 1967 Act that it appears no fewer than *thirteen* times.

The significance of Congress' move away from the "health of any persons" in 1967 to "public health" is revealed by the 1970 legislative history. The bill passed by the Senate in 1970 would indeed have required that NAAQS be set at the level "necessary to protect *the health of persons.*" S. 4358, 91st Cong., § 110(a)(3) (1970), *reprinted in* I Senate Comm. on Env. and Public Works, 93d Cong., *Legislative History of the Clean Air Amendments of 1970* (committee print 1974), at 486 (1974) (emphasis added) ("*1970 Legislative History*"). In addition, that Senate bill would also have required that States attain the NAAQS within a fixed period of time, irrespective of *either* equitable considerations *or* feasibility—the concepts that had limited abatement actions since 1963. *See id.*

§ 111(a)(2)(A), *I 1970 Legislative History*, at 487. The bill passed by the House, by contrast, transferred the equitable balancing authority previously carried out by the courts and the States to EPA which was directed to set NAAQS that protect "the public health." *See* H.R. 17255, 91st Cong., § 2(a) (1970), *reprinted in II 1970 Legislative History*, at 911. Unlike the Senate bill, the House would have provided no fixed deadlines for attainment. *See id.* § 4(a)(1), *reprinted in II 1970 Legislative History*, at 914.

The Conference Committee reconciled these competing approaches by accepting the House's "public health" test together with the Senate's fixed attainment deadlines. *See* H.R. 91-1783, 91st Cong. (1970), *reprinted in I 1970 Legislative History*, at 194 (Committee Report, Statement of the Managers on the Part of the House). Congress thus rejected the "health of persons" standard favored by the Senate, and overrode the feasibility limitations contained in the Act since 1963. But it did not repeal the Act's previous balancing of competing factors—factors that are inherent in the traditional concept of public health taken from the House bill. Not surprisingly, the Administrator's legislative history citations sometimes discuss the Senate bill's (ultimately rejected) "health of persons" standard and sometimes discuss its (ultimately accepted) fixed attainment deadlines, but *never* discuss the House-originated concept of "public health"—the only issue presently before the Court. *See* EPA Resp. 25-27. Indeed, the legislative history cited most prominently by the Administrator affirmatively supports our point—namely, that Congress embraced public health while rejecting the "concept of technical feasibility as the basis of ambient air standards," with the consequence that "existing sources of pollutants either should meet the standard of the law or be shut down." EPA Resp. 26 (quoting from 1970 Senate Report).

The Administrator's supposed structural arguments for why NAAQS are to be set based on air quality "alone" fare no better. First, the text of section 109(b) omits words of

limitation such as "only," "solely" or "alone" that might prove the Administrator's point. Cross-Pet. Br. 39. But even more important, the Criteria Document provision, section 108(a)(2)(C), directs EPA to *include* information relating to "any known or anticipated effects on *welfare*," thus expressly taking the criteria beyond medical science to "effects on economic values and on personal comfort and well-being." CAA §§ 108(a)(2)(C), 302(h), 42 U.S.C. § 7408(a)(2)(C), 7602(h) (emphasis added). On this point, the Administrator simply has no response to the arguments set out in our opening brief. *Compare* Cross-Pet. Br. 38. To be sure, as Massachusetts points out, Congress did indeed require EPA to promulgate revised NAAQS within 30 days of the effective date of the 1970 Amendments, thereby recognizing that the Agency would have to use the pre-existing criteria documents (which, unlike the documents to be compiled after 1970, contained only science data). *See* Mass. Br. 18. But that reflects only the 1970 Congress' desire for immediate promulgation of nationwide standards based on cost information readily at hand, whether or not it was contained in the criteria. This expedient fact does not alter the types of public health information that Congress required for *subsequent* criteria documents, which Congress directed EPA to revise "from time to time thereafter." CAA § 108(a)(1), 42 U.S.C. § 7408(a)(1).

Nor are the Administrator's other arguments any more persuasive. EPA Resp. 38-39. Contrary to her claims, Congress' rejection of feasibility as the basis for setting NAAQS hardly makes the cost information contained in the section 108(b)(1) documents irrelevant to the Administrator's public health standard-setting determinations. Indeed, the relevance of this cost information is underscored by Congress' directive that the section 108(b)(1) document be made available "simultaneously" with the criteria and well in advance of setting the NAAQS. *See* Cross-Pet. Br. 40. Finally, the Administrator tries to limit the role of the CASAC advisory provision (CAA § 109(d)(2)(C), 42 U.S.C. § 7409(d)(2)(C)) to

"implementation." EPA Resp. 39. But, as explained in our opening brief, section 109(d) is concerned with NAAQS standard-setting (not implementation), and in that connection, Congress specifically directed CASAC to advise *the Administrator* (the official responsible for NAAQS standard-setting) on certain "social, economic, or energy effects" that are relevant to public health determinations under section 109(b). *See* Cross-Pet. Br. 41.

The Administrator's remaining argument—namely, that Congress "preserv[ed] the ability of EPA and the States to consider costs and feasibility in the implementation stage," EPA Resp. 24-25—ignores this Court's *Cotton Dust* decision and badly misstates the holding of *Union Electric*. In the OSH Act (also enacted in 1970), Congress confronted a problem similar in certain respects to that which it confronted in the 1970 Clean Air Amendments. Should it require OSHA to set industry-specific toxic substance workplace standards on the basis of "feasibility," or "cost-benefit analysis"? *See Cotton Dust*, 452 U.S. at 508-513. As the Court held, Congress chose "feasibility," necessarily ruling out "cost-benefit analysis." *Id.* at 509. For reasons already explained, *see* pp. 8-14, *supra*, Congress made precisely the opposite choice in the 1970 Clean Air Amendments—selecting public health standards that would balance competing considerations, albeit with an added admonition that the Administrator also provide "an adequate margin of safety."

The thrust of the Administrator's argument in this case is that Congress ruled out *both* feasibility *and* cost-benefit analysis when it enacted CAA section 109(b). That extreme contention lies at the heart of both the nondelegation problem identified by the lower court and the Administrator's inherently implausible claim that science alone can decide public policy questions. But even *Union Electric*, the case on which the Administrator relies most heavily, does not remotely support such a position. That decision never mentions cost-benefit analysis, much less does it explicate the public health basis for setting NAAQS. Rather,

Union Electric could not be clearer that it dealt only with "technological and economic infeasibility," 427 U.S. at 265—a concept that the Court held EPA could *not* consider even during the implementation stage. Under *Union Electric*, these factors can indeed be considered by States, but only in the limited sense that States may entertain applications for "special treatment" for any source "[s]o long as the national standards are met." *Id.* at 266.

The concept of a feasibility test also explains the CAA provisions that the Administrator would contrast with section 109(b). *See* EPA Resp. 20 n.13. In particular, the new source performance standards (CAA § 111(a)(1), 42 U.S.C. § 7411(a)(1)), motor vehicle emission standards (CAA § 202(a)(2), 42 U.S.C. § 7521(a)(2)), and aircraft emission standards (CAA § 231(b), 42 U.S.C. § 7571(b)) cited by the Administrator are all "feasibility" standards within the meaning of *Cotton Dust*. The various cost-consideration directives in those contexts therefore do not create any inference that Congress would also have wanted to further define the role of costs in the much different context of section 109(b), which calls for standards set to protect the public health as traditionally defined.

The post-1970 legislative history on which the Administrator also relies heavily, *see id.* at 27-31, carries "very little, if any, significance." *See United States v. Southwestern Cable Co.*, 392 U.S. 157, 170 (1968) (internal quotation omitted); *Blanchette v. Connecticut Gen.*, 419 U.S. 102, 132 (1974). But, not surprisingly, that post-enactment legislative history supports our interpretation at least as much as the Administrator's. *See, e.g.*, H.R. Rep. No. 95-294 at 127 (1977) (Administrator must consider "economic and social consequences" in NAAQS standard-setting).

The Administrator's final gasp amounts to an argument that Congress somehow ratified her interpretation in the various Clean Air Amendments after 1970. *See* EPA Resp. 27-31. The

Administrator's argument in this respect necessarily turns on legislative *inaction* since Congress has never amended the 1970 text of section 109(b) or the relevant provisions of section 108. But "inaction" is "a particularly dangerous ground on which to rest an interpretation of a prior statute," "because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (internal quotations omitted). This Court's recent decision in *FDA v. Brown & Williamson Tobacco Corp.* is not to the contrary because in that case Congress actually had enacted legislation that conflicted with FDA's interpretation of the Act. *See* 120 S. Ct. at 1306. Here, by contrast, "the statutory changes adopted [outside of section 109(b)] are entirely consistent with our interpretation," and thus "do[] not modify the plain terms of [the Act]." *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 615-16 (1981); *accord Aaron v. SEC*, 446 U.S. 680, 695 n.11 (1980).

Finally, it is worth noting that the Administrator's constructions of "public health" and "welfare" are internally self-contradictory. Specifically, the Administrator would limit relevant "welfare" effects under the Act's section 307(h), 42 U.S.C. § 7607(h), to effects caused by "exposure to air pollutants," as opposed to "the effect of measures to implement the NAAQS." EPA Resp. 37. But under that formulation, the Administrator would be compelled to abate pollution that causes "economic" damage, even in circumstances where the cost of abatement greatly exceeds the "economic values" the NAAQS are designed to protect.

An analogous contradiction inheres in the Administrator's proffered definition of "public health." Excluding consideration of costs can produce "such large reductions in income that lives are lost on net." *See* Richard J. Zeckhauser & W. Kip Viscusi, *The Risk Management Dilemma*, 545 Annals Am. Acad. Pol. & Soc. Sci. 144, 149 & n.6 (1996); *see also* AEI-Brookings *Amici*

Br. 2 & n.2 (better allocation of health resources would result either in "savings of $31.1 billion from current cost levels with no additional loss of life or savings of 60,200 lives at current cost levels").

III. *STARE DECISIS* DOES NOT APPLY IN THIS CASE.

While the Administrator never expressly argues that *Lead Industries* should have *stare decisis* effect, certain of her supporters do make that argument. *See, e.g.*, Environmental Defense *Amici* Br. 16-19. *Lead Industries* is, however, a particularly inappropriate basis for application of the *stare decisis* principle.

First, as suggested in our opening brief, there are valid reasons to suspect that EPA Administrators may actually have considered competing factors including costs in setting previous NAAQS—and perhaps even in setting the ozone and PM standards under review here. *See* Cross-Pet. Br. 43-45. The various *amici curiae* briefs have provided additional support both for the fact that this has occurred as well as added reasons why transparency in the NAAQS standard-setting process is so essential. *See* Marchant *Amici* Br. in No. 99-1257, at 12-15; AEI-Brookings *Amici* Br. 12; David L. Faigman, LEGAL ALCHEMY: THE USE AND MISUSE OF SCIENCE IN THE LAW 187 (1999) ("real loser in the PM/ozone drama was candor"). Giving *stare decisis* effect to *Lead Industries* under these circumstances would effectively license the Administrator to shield her decisionmaking process from public and judicial scrutiny in violation of this Court's decisions. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983).

Second, our opening brief also shows that in other cases EPA has sought—and the D.C. Circuit has granted—authority for the Agency to consider competing factors including costs under other CAA provisions comparable to section 109(b). *See* Cross-Pet. Br. 45-47. Certain parties have misportrayed this discussion as advocating a construction canon holding that costs

must be considered unless such consideration is expressly precluded. *See, e.g.*, Mass. Resp. 40. That was not our intent.

Certainly it is true that *State of Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000), and similar cases would support such a canon. But the Court need not go so far here. *See* ATA Resp. in No. 99-1257, at 24 (noting that the Court could, but need not in this case, engage in "aggressive judicial construction"). Rather, the point is that the Administrator must be consistent. She cannot argue here that costs cannot be considered because Congress "has *indicated expressly* when and to what extent costs and implementation effects *should* be considered in the NAAQS regulatory process," *id.* at 19 (emphasis added)—and then simultaneously defend in *State of Michigan* her contrary position that costs were relevant there because the Act provided "no evidence of congressional intent to *exclude* costs," *id.* at 41 n.33 (emphasis added). In sum, *State of Michigan* and similar D.C. Circuit Clean Air Act decisions testify eloquently to *Lead Industries*' frail status as a circuit precedent, *see* Cross-Pet. Br. 27, and provide yet additional grounds for not giving *stare decisis* effect to that decision.

This Court's *certiorari* jurisdiction provides the final, and ultimately conclusive, answer to the bid to give *stare decisis* effect to *Lead Industries*. The denial of *certiorari*, of course, "imparts *no* implication or inference concerning the Court's view of the merits." *See, e.g., Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363, 366 n.1 (1973) (emphasis added). As a logical matter, then, *stare decisis* cannot apply here without creating far more than an "implication" concerning the merits of cases like this one, where *certiorari* has previously been denied on issues for which a circuit conflict is highly unlikely.

CONCLUSION

For the foregoing reasons, the Court should grant the relief requested in our cross-petitioners brief.

Respectfully submitted,

ROBIN S. CONRAD
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Counsel for Chamber of Commerce of the United States

BETH L. LAW
ROBERT S. DIGGES
ATA LITIGATION CENTER
2200 Mill Road
Alexandria, VA 22314
Counsel for American Trucking Associations, Inc., Burns Motor Freight, Inc., Garner Trucking, Inc.

JAN S. AMUNDSON
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20036
Counsel for National of Manufacturers

DIMETRIA G. (JIM) DASKAL
THE DASKAL LAW GROUP
3 Church Circle
Suite 500
Annapolis, MD 21401
Counsel for National Coalition of Petroleum Retailers

EDWARD W. WARREN
Counsel of Record
ROBERT R. GASAWAY
JEFFREY B. CLARK
DARYL JOSEFFER
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

CHARLES FRIED
1525 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4636
Counsel for American Trucking Associations, Inc. and Chamber of Commerce of the United States

GARY H. BAISE
ELIZABETH S. POLINER
BAISE, MILLER & FREER, P.C.
1020 19th Street, N.W.
Washington, D.C. 20036
Counsel for Equipment Manufacturers Institute

DAVID M. FRIEDLAND
BEVERIDGE & DIAMOND
1350 I Street, N.W.
Suite 700
Washington, D.C. 20005
Counsel for National Small Business United, The American Portland Cement Alliance, and The Glouster Company, Inc.

DOUGLAS I. GREENHAUS
NATIONAL AUTOMOBILE
DEALERS ASSOCIATION
8400 Westpark Drive
McLean, VA 22102
Counsel for National Automobile Dealers Association

JEFFREY L. LEITER
CHET M. THOMPSON
COLLIER, SHANNON, RILL & SCOTT
3050 K Street, N.W.
Suite 400
Washington, D.C. 20007
Counsel for Non-Ferrous Founders' Society

ERIKA Z. JONES
TIMOTHY S. BISHOP
ADAM C. SLOANE
MAYER, BROWN & PLATT
1909 K Street, N.W.
Washington, D.C. 20006
Counsel for American Farm Bureau Federation

ROBERT R. GASAWAY
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
Counsel for American Road and Transportation Builders Association